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No. _____

In The

Supreme Court of the United States

October Term, 1992

LAURYN AGNEW BIERDEMAN,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must Lauryn Agnew Bierdeman's claims of gender and pregnancy discrimination, filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1982), be arbitrated under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1990)?

2. Does the Federal Arbitration Act exclude an agreement to arbitrate disputes, as embodied in the constitutions and rules of the securities exchanges?

a) Do the constitutions and rules of the exchanges constitute an employment contract between the parties?

b) If so, does Section 1 of the Federal Arbitration Act exclude this employment contract from the coverage of the Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lauryn Agnew Bierdeman ("Bierdeman") respectfully prays that a writ of certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The unpublished slip opinion and order of the United States Court of Appeals for the Ninth Circuit are reprinted in Appendices 1 and 2, pp. 1a-3a and 4a-5a,

respectively. *Bierdeman v. Shearson Lehman Hutton, Inc.*, No. 90-16024, (9th Cir. May 28, 1992).

The order of the United States District Court for the Northern District of California is reported at 744 F.Supp. 211 (N.D. Cal. 1990), and is reprinted in Appendix 3 of this Petition, pp. 6a-15a.

JURISDICTION OF THE SUPREME COURT

The unreported slip opinion of the Ninth Circuit was issued and entered on May 28, 1992. Petitioner Lauryn Agnew Bierdeman respectfully seeks review of that Opinion. The Mandate Order of the Ninth Circuit was issued on May 28, 1992, and entered on July 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

PERTINENT STATUTORY PROVISIONS

This Petition concerns the following statutes:

1) Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, the text of the pertinent portions of which is set forth in Appendix 4, pp. 16a-26a.

2) The Pregnancy Discrimination Act, amending Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e(k) (1982), Appendix 4, pp. 19a-20a, and 2000e-2 (1982), Appendix 4, pp. 20a-26a.

3) Section 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, which provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1 (1990).

4) Section 2 of the FAA, 9 U.S.C. § 2, which provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or

in equity for the revocation of any contract. 9 U.S.C. § 2 (1990).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Petitioner Lauryn Agnew Bierdeman ("Bierdeman") filed a Complaint for Damages on December 18, 1989, alleging that her former employer, Respondent Shearson Lehman Hutton, Inc. ("Shearson") had discriminated against her based on her gender and on her pregnancies. Bierdeman alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1982) ("Title VII"). Service of process was effected on or about January 3, 1990.

On or about February 22, 1990, Shearson filed a motion in district court for an order compelling arbitration of Bierdeman's claims, pursuant to the constitutions and rules of the New York Stock Exchange, Inc. ("NYSE"), National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange, Inc. ("AMEX"), and the FAA, 9 U.S.C. § 1, *et seq.* (1990). *Bierdeman v. Shearson Lehman Hutton, Inc.*, 744 F.Supp. 211 (N.D. Cal. 1990). In its 1990 decision, the district court denied Shearson's motion by an order entered on or about June 20, 1990. *Bierdeman*, 744 F.Supp. 211. The district court rendered its decision prior to this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ___, 111 S.Ct. 1647 (1991).

The district court found that the agreement was unenforceable as to Bierdeman's Title VII claims on the

ground that Bierdeman could not have prospectively waived her right to a judicial determination of such claims. *Bierdeman*, 744 F.Supp. at 214. The district court ruled that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974), governed the issue and that arbitration of Bierdeman's Title VII claims could not be compelled. *Id.*

Furthermore, the district court explicitly rejected Shearson's argument that certain appellate court decisions compelling arbitration of claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* (1982), were applicable to the instant case. *Bierdeman*, 744 F.Supp. at 214.

Shearson filed a timely notice of appeal of the district court's order. *See* Appendix 1, *Bierdeman v. Shearson Lehman Hutton, Inc.*, No. 90-16024, slip opinion at 2 (9th Cir. May 28, 1992). The Ninth Circuit, relying upon its decision in *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) and upon *Gilmer*, reversed the District Court and remanded the matter. *Bierdeman*, No. 90-16024, slip op. at 2.[1] Bierdeman now petitions this Court for a

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[1] One of two reasons given by the Ninth Circuit for rejecting Bierdeman's argument that FAA § 1 excludes her contract with Shearson from application of the FAA was that Bierdeman raised the issue for the first time before the Ninth Circuit. *Bierdeman*, No. 90-16024, slip op. at 2. However:

> It should be noted that the Ninth Circuit has recognized three exceptions to [the general rule that it will not consider issues raised for the first time on appeal]: . . . [including] when the issue presented is

(Continued on following page)

writ of certiorari to review the decision of the Ninth Circuit.

II. FACTUAL BACKGROUND

In the Complaint, Bierdeman alleges the following facts: Bierdeman was employed with Shearson from approximately May, 1983, through January 4, 1988, as an institutional equities sales person. Bierdeman took two pregnancy leaves of absence during her employment with Shearson, returning to work after each leave. Following

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(Continued from previous page)

> purely one of law and either does not depend upon the factual record developed below, or the pertinent record has been fully developed, (citation) . . . If one of the exceptions is applicable, we have discretion to address the issue. *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985).

Bierdeman respectfully submits that the question concerning the application of FAA § 1 is a purely legal one, and that no development of the record below is required to answer it. Thus, she submits that the Ninth Circuit had discretion to address the issue.

The second reason for which the Ninth Circuit rejected Bierdeman's § 1 argument was its adoption of this Court's holding in footnote 2 of *Gilmer* that arbitration agreements arising from securities registration applications are not contracts of employment within the meaning of § 1, and thus are subject to the application of the FAA. *Bierdeman*, No. 90-16024, slip op. at 2. Bierdeman submits that the Ninth Circuit's holding does not answer the question presented herein: Were the constitutions and rules of the exchanges in which Bierdeman and Shearson were registered part of their employment contract with each other, and thus exempt from the FAA? See § II, *infra*.

her return from each leave, Shearson took punitive action against her in response to her pregnancies. These actions included reducing her accounts, bonus points and bonuses, and removing her Quotron machine.

When Bierdeman questioned her superiors about the actions, her superiors informed her that she "complained too much." Shearson's employees told her that her pregnancy "was not in the best interests of the company," and made other disparaging comments about her pregnancy.

Until just two weeks before Shearson terminated Bierdeman's employment, she had received only positive comments on her job performance, and was never informed of any performance deficiencies.

Shearson terminated Bierdeman on or about January 4, 1988, for the stated reason that she was "not penetrating smaller accounts." One of Shearson's clients informed Bierdeman that her former immediate supervisor at Shearson had stated that Bierdeman was fired because "she wanted to stay home with her babies." *Id.*

At the time that Shearson terminated Bierdeman, she was the only woman employed in Shearson's west coast institutional equities sales department, and was the only member of that department fired. Bierdeman alleges that Shearson's stated reason for terminating her was a pretext. Shearson replaced Bierdeman with a man within two hours of her termination.

Bierdeman filed a charge of discrimination with the Equal Employment Opportunities Commission ("EEOC") on or about August 24, 1988, and filed the Complaint for

Damages for Violation of Civil Rights on or about December 18, 1989.

III. BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction over Bierdeman's Title VII pregnancy discrimination action properly resided in the District Court for the Northern District of California pursuant to 28 U.S.C. § 1343(a)(4) (1991), and 42 U.S.C. § 2000e-5(f)(3). Furthermore, the district court had jurisdiction over Shearson's motion to compel arbitration, pursuant to Section 4 of the FAA, 9 U.S.C. § 4.

REASONS FOR GRANTING THE WRIT

I. MUST BIERDEMAN'S TITLE VII GENDER AND PREGNANCY DISCRIMINATION CLAIMS BE ARBITRATED UNDER THE FAA?

A. The Court Has Not Addressed The Issue of Arbitrability of Title VII Claims

The Ninth Circuit, relying upon *Gilmer* and its decision in *Mago*, reversed the district court's denial of Shearson's motion to compel arbitration, remanded the matter to the district court and held that Bierdeman's Title VII gender discrimination claim was arbitrable. *Bierdeman*, No. 90-16024, slip op. at 2, Appendix 1, pp. 2a-3a.

Petitioner respectfully notes that this Court has not addressed the issue of arbitrability of claims arising under the Pregnancy Discrimination Act or Title VII since its decision in *Alexander v. Gardner-Denver Co.* The pivotal

inquiry in the instant Petition is whether or not the Court's analyses and rulings in *Gilmer*, a case arising under the ADEA, apply to a case arising under Title VII. Important differences between *Gilmer* and the case at bar support Petitioner Bierdeman's Petition for a writ of certiorari to review the Ninth Circuit's decision.

First, and most obviously, *Gilmer* arose out of an alleged violation of the ADEA. The ADEA, which prohibits discrimination based on age, encompasses a statutory scheme that is entirely separate from Title VII, which was amended to prohibit, *inter alia*, pregnancy discrimination. Congress intended for the ADEA to conform to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, rather than Title VII with respect to enforcement and remedies. 1967 U.S. Code Cong. & Admin. News 2213, 2218; *see also*, Schlei and Grossman, *Employment Discrimination Law* 485 (2d ed. 1983). Furthermore, Congress enacted the ADEA a mere three years after enacting Title VII. Congress apparently did not intend that the ADEA mirror Title VII. Therefore, the Court's decision concerning the arbitrability of ADEA claims pursuant to the FAA is not inherently dispositive of the question of the arbitrability of Title VII claims.

Furthermore, in *Gilmer*, the employer relied upon Gilmer's signing of a securities registration application in support of its motion to compel arbitration. *Gilmer*, 500 U.S. at ___, 111 S.Ct. at 1651. By contrast in the instant case, Shearson relied, in its motion to compel arbitration, upon the arbitration provisions of the constitutions and regulations of the exchanges in which Bierdeman was a registered agent. *Bierdeman*, 744 F.Supp. at 211. Thus, the

basis for invoking the FAA is distinguishable in the two cases.

B. A Conflict Exists Among The Courts Of Appeals

The Fifth and Sixth Circuits have joined the Ninth Circuit in extending the Court's holding in *Gilmer* to Title VII cases. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Willis v. Dean Witter Reynolds*, 57 Fair Empl. Prac. Cas. (BNA) 386 (6th Cir. 1991).

The First and Eighth Circuits, however, have ruled that Title VII discrimination actions are not subject to arbitration under the FAA based upon their recognition of the distinct status of Title VII among federal statutory schemes. *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 110 U.S. 842; *Swenson v. Management Recruiters Internat'l., Inc.*, 858 F.2d 1304, 1306-07, n.6 (8th Cir. 1988).

Petitioner respectfully petitions the Court to resolve the existing conflict on the question among the United States Courts of Appeals.

II. DOES THE FAA EXCLUDE AN AGREEMENT TO ARBITRATE DISPUTES, AS EMBODIED IN THE CONSTITUTIONS AND RULES OF THE EXCHANGES?

The second question presented by this Petition concerns the scope of the exclusionary provision of the FAA, 9 U.S.C § 1. Section 1 provides, in pertinent part: "[N]othing contained herein shall apply to contracts of employment of seamen, railroad employees, or any other

class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Court expressly declined to decide the precise parameters of Section 1 in *Gilmer*. *Gilmer*, 500 U.S. at ___, 111 S.Ct. at 1651-52, n.2. In footnote 2, the Court noted first that Gilmer had not raised the exclusionary provision, but that the issue was raised by *amicus curiae*. *Id.* The Court ruled that the securities registration application that Gilmer signed did not constitute a contract of employment, and, thus, Section 1 did not operate to exclude it from the coverage of the FAA. *Id.* ["[W]e therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amicus curiae*."]

The instant Petition raises the question presented in footnote 2 regarding the scope of the exclusionary provision in a significantly different context than that in which it appeared in *Gilmer*, as discussed, *infra*. Petitioner respectfully petitions the Court to address the scope of Section 1, which is a matter of significance to countless thousands of employees and employers nationwide.

A. Do The Constitutions And Rules Of The Exchanges Constitute A Part Of The Employment Contract Between The Parties?

The Court has not addressed the question of whether or not an employee's contract with her employer, as evidenced by the constitutions and rules of the securities exchange by which both are bound, constitutes a contract of employment for purposes of Section 1. In *Gilmer*, the contract at issue was Gilmer's securities registration

application for registration with, *inter alia*, the NYSE. *Id.* at 1650-51.

In the instant case, the contract at issue is that created by the parties' agreement to adhere to the constitutions and regulations of the NYSE, NASD, and AMEX. *Bierdeman*, 744 F.Supp. at 211. The "arbitration provisions contained in the rules of the various [exchanges] have contractual force." *Id.* at 212 (citing *Muh v. Newberger, Loeb, & Co., Inc.*, 540 F.2d 970, 973 (9th Cir. 1976)). What remains unsettled is whether or not the contract created by the constitutions and rules of the exchanges is part of their employment contract.[2] This Petition seeks an answer to that question.

Significantly, the First Circuit, in a decision cited with approval by the Court, has found that registration application *was* an "integral and mutually binding part of [the employee's] employment arrangement with [his employer]." *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971), *cited with approval in Gilmer*, 500 U.S. at ___, 111 S.Ct. at 1652 n.2. The First Circuit based its finding that Section 1 did not exclude the contract before it upon the narrow definition of "commerce" set forth in *Tenney Engineering, Inc. v. Elec. Radio & Mach. Workers*, 207 F.2d 450 (3rd Cir. 1952) (*en banc*), discussed in detail, *infra*.

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[2] The constitutions and rules of the exchanges by which a registered agent is bound govern many aspects of her employment as a securities salesperson. For example, Rule 347 of the NYSE Rules provides for arbitration of "[a]ny controversy between a registered representative and any member or member organization *arising out of the employment or termination of employment* of such registered representative . . . " (emphasis added). *See Willis*, 57 Fair Empl. Prac. Cas. (BNA) at 387.

Furthermore, in *Gilmer*, the Court found that the securities registration application that Gilmer signed was not a contract between Gilmer and his employer, but rather, a contract between Gilmer and the exchange to which he was applying. *Gilmer*, 500 U.S. at ___, 111 S.Ct. at 1652, n.2. In the instant case, Shearson has conceded that it was party to the agreement created by the constitutions and rules of the exchanges. *Bierdeman*, 744 F.Supp. at 212. Moreover, the constitutions and rules of the exchanges "constitute a contract between all members of the exchange *with each other* . . . " *Muh*, 540 F.2d at 973 (emphasis added) (*citing Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Morgan v. Smith Barney Harris Upham & Co.*, 729 F.2d 1163, 1164-65 (8th Cir. 1984). Shearson moved to enforce this contract under the FAA. *Bierdeman*, 744 F.Supp. at 212. Thus, the contract involved in the instant Petition is different from the contract on which the Court ruled in *Gilmer*.

Thus, the question of whether the securities exchanges' constitutions and rules are part of Bierdeman's employment contract with Shearson remains unanswered by the Court.

B. If The Constitutions And Rules Of The Exchanges Constitute A Part Of The Parties' Employment Contract, Does Section 1 Of The FAA Exclude This Employment Contract From The Coverage Of The Act?

If the question discussed in the preceding section is answered affirmatively, the final question arises: Does

Section 1 exclude employment contracts, such as Bierdeman's contract with Shearson, from the coverage of the Act?

As noted above, the First Circuit found that Section 1 did not exclude from FAA coverage the employment contract presented in *Dickstein*, due to that court's narrow interpretation of "commerce" as limited to the actual "movement of goods in interstate commerce". *Dickstein*, 443 F.2d at 785. The Court, in *Gilmer*, cited *Dickstein* for the proposition that Section 1 is inapplicable to arbitration clauses contained in securities registration applications like the one Gilmer signed. *Gilmer*, 500 U.S. at ___, 111 S.Ct. at 1652, n.2.

In adopting a narrow definition of the term "commerce," as it is used in Section 1, *Dickstein* relied on *Tenney Engineering*, 207 F.2d 450. In *Tenney Engineering*, the Third Circuit held that the term "engaged in commerce" in Section 1 is to be read as narrower than the term "transaction involving commerce" in Section 2. *Id.* at 451-53.[3] As discussed below, this "site specific" interpretation of the term "commerce" not only defies logic, but also contravenes the intent behind the FAA.

The significance of this confusion about the affirmative coverage provision vis-a-vis the exclusionary provision of the FAA resides in the fact that the term

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[3] The Third Circuit also erroneously believed that the affirmative reach of the FAA, § 2, did not apply to § 3 of the FAA, the section at issue in that case. The court's interpretation of § 3 was incorrect. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201, 76 S.Ct. 273, 275 (1956).

"commerce" is used in both provisions. Section 2 provides that "[a] written provision in any . . . contract evidencing a transaction involving *commerce* to settle by arbitration a controversy . . . is valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The appellate courts have grappled with the usage of the term in the two provisions, but have not found a unified approach.

One line of authority, that adopted by the First Circuit in *Dickstein*, holds that the term "commerce" as used in Section 1 is limited to the "actual movement of goods in interstate commerce". *Dickstein*, 443 F.2d at 785; *Signal-Stat Corp. v. Local 457, United Elec., Radio & Mach. Workers of Am.*, 235 F.2d 298, 301-03 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1956); *Erving v. The Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Tenney Engineering*, 207 F.2d at 451-453; *Miller Brewing Co. v. Brewery Workers Loc. Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

A second line of authority holds that Section 1 excludes from the coverage of the FAA *all* contracts of employment implicating interstate commerce, regardless of whether or not the movement of goods is involved. *Herring v. Delta Airlines*, 894 F.2d 1020, 1023 (9th Cir. 1990), *cert. denied*, 110 S.Ct. 1319 (1990); *United Food and Commercial Workers Loc. Union No. 702 v. Safeway Stores*, 889 F.2d 940, 944 (10th Cir. 1989).

The definition adopted by the Court will determine which contracts are covered by the FAA and which are not. At present, that issue is undecided and the Courts of

Appeals are in conflict. To highlight the significance of the definition of "commerce" in Sections 1 and 2, Petitioner respectfully submits the following discussion of the disparate results obtained depending upon the definition applied.

1. If "Commerce" Is Given Parallel, And Narrow, Meaning In Both Section 1 And Section 2, Bierdeman's Contract Falls Outside The Affirmative Scope Of The FAA And Arbitration Cannot Be Compelled

If "commerce" means the actual movement of goods in interstate commerce in both sections, most employment contracts will not be excluded by Section 1, but will fall outside scope of Section 2 affirmative coverage of FAA. This is so because Section 2 would not encompass employment contracts other than those for employees involved in the actual movement of goods in interstate commerce, immunizing the vast majority of contracts of employees involved in interstate commerce from the strictures of the FAA.

2. If "Commerce" Is Given Parallel, And Broad, Meaning In Both Section 1 And Section 2, Bierdeman's Contract Is Excluded From The FAA

If "commerce" means involvement in interstate commerce in both sections, and is not limited to the actual movement of goods, Section 2 would encompass employment contracts in virtually every industry, but Section 1 would exclude them from the FAA's coverage.

Thus, if the terms are parallel and coextensive in meaning, and broadly construed, as the Court found in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401, 87 S.Ct. 1801, 1804-5 (1967), the FAA excludes employment contracts for any employee who is employed in a job implicating interstate commerce.

3. If "Commerce" Is Given A Narrower Meaning In Section 1 Than In Section 2, Result Is Reductio Ad Absurdum

The Third Circuit has defined "commerce" as used in Section 1 of the FAA as the actual movement of goods in interstate commerce, and has defined "commerce" as used in Section 2 as interstate commerce generally. *Tenney Engineering*, 207 F.2d at 451-453. The adoption of this view results in the exclusion under Section 1 of those employment contracts which are most directly involved in interstate commerce, *i.e.*, transportation industry contracts, while including under Section 2 those contracts which are less involved in interstate commerce, *i.e.*, non-transportation industry contracts. It is unfathomable that Congress would have intended such a result to obtain when enacting the FAA.

Given the widely divergent results under the three definitions of "commerce" as used in the FAA and the conflict among the Courts of Appeals, the Court must resolve the conflict and issue a definitive ruling on the matter.

CONCLUSION

For the foregoing reasons, Petitioner respectfully petitions the Court for a writ of certiorari to review the decision of the Ninth Circuit which reversed the District Court's denial of Respondent's motion to compel arbitration under the FAA.

Respectfully submitted,

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(415) 433-6166

Attorneys for Petitioner

DATED: August 18, 1992

APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAURYN BIERDEMAN, Plaintiff-Appellee, v. SHEARSON LEHMAN HUTTON INC., Defendant-Appellant.	NO. 90-16024 D.C.# CV-89-4473-RFP **MEMORANDUM*** (Filed May 28, 1992)

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

Argued and Submitted October 7, 1991
San Francisco, California
Submission Deferred October 17, 1991
Resubmitted: May 13, 1992

BEFORE: TANG, REINHARDT, and TROTT, Circuit Judges.

Lauryn Agnew Bierdeman filed suit against her former employer, Shearson Lehman Hutton Inc. ("Shearson"), alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1981). At the beginning of her

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

employment with Shearson, Bierdeman executed a Uniform Application for Securities Industry Registration. The application form, among other things, required Bierdeman to arbitrate any dispute between Shearson and herself arising out of her employment. Shearson filed a motion for a stay of the district court proceedings pending arbitration. The district court denied the motion on the ground that Title VII cases are not arbitrable. Shearson timely noticed its appeal to this court. We reverse and remand.

This court recently ruled that Title VII disputes are arbitrable. *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) The district court's contrary conclusion was erroneous.

Bierdeman argues, alternatively, that her agreement to arbitrate is not subject to the Federal Arbitration Act because it arises from a contract of employment. The Federal Arbitration Act expressly excludes from its provisions "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1970). We reject Bierdeman's argument for two reasons.

First, this argument was not raised below. We ordinarily will not entertain arguments raised for the first time on appeal. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

Second, the Supreme Court has held that arbitration agreements arising from a securities registration application do not constitute "contracts of employment" within the meaning of 9 U.S.C. § 1, and are in fact subject to the Federal Arbitration Act. *Gilmer v. Interstate/Johnson Lane*

Corp., ___ U.S. ___, 111 S. Ct. 1647, 1651-52 n.2 (1991); *see also Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230n.* (5th Cir. 1991).

REVERSED and REMANDED.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-16024
CT/AG#: CV-89-4473-RFP

(Filed July 8, 1992)

LAURYN BIERDEMAN
Plaintiff - Appellee

v.

SHEARSON LEHMAN HUTTON INC.
Defendant - Appellant

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ___ judgment

of the said District Court in this cause be, and hereby is REVERSED and REMENDED [sic].

Filed and entered 05/28/92
A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUN 24 1992

by: Verna Lavin
Deputy Clerk

APPENDIX 3

LAURYN AGNEW BIERDEMAN, Plaintiff, v. SHEARSON LEHMAN HUTTON, INC., Defendant.	)	No. C-89-4473 RFP ORDER (Filed June 20, 1990)

I. INTRODUCTION.

We are presented with a motion by defendant Shearson Lehman Hutton ("Shearson") to stay proceedings and compel arbitration in this sex discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff Lauryn Agnew Bierdeman was employed by Shearson as an institutional equity salesperson. She alleges that Shearson first reduced her compensation and ultimately terminated her employment because of her sex and in retaliation for her twice taking pregnancy leave. After timely submitting her claim to the Equal Employment Opportunity Commission ("EEOC") and receiving a notice of right to sue, Bierdeman filed this action in federal district court. She has refused to submit to arbitration, arguing that the Title VII statute and judicial authority interpreting it entitle her to pursue a remedy in federal court without first submitting her grievance to binding arbitration.

Defendant Shearson now moves to stay Bierdeman's action and to compel her to submit her claim to arbitration. Shearson argues that Bierdeman is contractually bound to arbitrate her claim by the constitutions and regulations of the New York Stock Exchange ("NYSE"), National Association of Securities Dealers ("NASD"), and American Stock Exchange ("AMEX"), which she agreed to comply with when she accepted employment with defendant. Shearson wants Bierdeman to submit to arbitration as provided by the rules of these organizations.

Shearson attempts to distinguish Supreme Court authority holding that arbitration agreements cannot prevent Title VII plaintiffs from pursuing their remedies in federal court. In doing so, Shearson separates the Supreme Court's decisions on the arbitrability of various statutory claims into decisions involving collective bargaining agreements and decisions involving privately negotiated commercial arbitration agreements such as those implicated here. While this categorization allows Shearson to distinguish Supreme Court precedent holding that Title VII plaintiffs do not waive their right to a judicial remedy by signing an arbitration agreement, it is nevertheless spurious. The decisions which Shearson relies upon in arguing for enforcement of the NYSE, NASD, and AMEX arbitration provisions without exception involve statutes other than Title VII.

II. BACKGROUND.

Plaintiff Lauryn Bierdeman went to work for Lehman Brothers in May, 1983, as an institutional equity salesperson. The following year, defendant Shearson acquired

Lehman Brothers. When plaintiff accepted her position, she signed an agreement which provided in pertinent part, "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . . " Shearson alleges that plaintiff then registered with the NYSE, the NASD, and AMEX, and that the constitutions and rules of those organizations require her to arbitrate her claim.

Bierdeman claims that Shearson discriminated against her on the basis of her sex; specifically, she contends that her bonus compensation was cut and that she was eventually terminated because she took pregnancy leave. Bierdeman was the only female employee in Shearson's West Coast Equity Sales Department. She took two three-month pregnancy leaves during the time she was employed by Shearson – the first from October through December of 1985, and the second from May through July of 1987. She alleges that her supervisors reduced the number of accounts that she managed and reduced the number of "bonus points" she received after her first pregnancy leave. After her second leave, she alleges that her bonus points were again cut and that Shearson removed a Quotron machine which she contends she needed in order to be able to perform her job. She was terminated in December 1987 and replaced with a male employee on the same day.

Bierdeman contends that Shearson agents and employees told her that her pregnancy leaves were not in the company's best interests. She contends that she heard through a client that Shearson told the client she was

terminated because she preferred to be at home with her children.

Bierdeman filed a complaint with the EEOC and received a notice of right to sue. She timely filed this action on December 18, 1989. Shearson has formally demanded that Bierdeman submit her grievance to arbitration. Demand Letter, Declaration of Jeffrey L. Friedman at Exhibit 2. Plaintiff maintains that she is not compelled to do this.

III. DISCUSSION.

Defendant Shearson's position is that plaintiff agreed at the time of accepting employment to submit any complaints against Shearson to arbitration. In support of this position, Shearson relies upon her agreement, quoted above, to comply with the arbitration regulations of any self-regulating organizations ("SRO's") of securities brokers that she registered with.

Bierdeman registered with the NYSE, the NASD and AMEX. Declaration of Jeffrey L. Friedman at ¶7 and at Exhibit 1. NYSE Rule 600(a) provides that any dispute or claim arising between a member organization and an "associated person" of that member organization shall be submitted to arbitration. The NASD Code of Arbitration Procedure §8(a) similarly provides for the submission to arbitration of "any dispute, claim, or controversy arising out of or in connection with the business of any member of the association." Shearson asserts that the AMEX arbitration rules also bind plaintiff to submit to arbitration. Ninth Circuit authority holds that the arbitration provisions contained in the rules of the various SRO's have

contractual force. *Muh v. Newberger, Loeb, & Co., Inc.*, 540 F.2d 970, 973 (9th Cir. 1976). Therefore, we find that Shearson has made a *prima facie* showing that a contract existed between it and Bierdeman requiring that she submit any grievances between her and Shearson to arbitration by the procedures set up by one of the SRO's.[1]

However, even if Bierdeman's agreement to submit disputes with Shearson to arbitration in accordance with SRO rules constitutes a valid contract, it nevertheless is unenforceable. A line of Supreme Court cases holds that a Title VII plaintiff does not prospectively waive her right to pursue relief in federal court when she agrees to arbitration of disputes.

The seminal case in this area is *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In *Alexander*, the Court held that a prior arbitration decision finding that the plaintiff's claim had no merit could not foreclose plaintiff's right to bring a Title

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[1] We assume for purposes of argument, but do not decide, that this agreement is valid. Plaintiff has challenged the validity of the agreement to submit to arbitration, characterizing it as a contract of adhesion. While the Ninth Circuit has rejected the proposition that NASD and NYSE arbitration agreements can be defined as unconscionable as a matter of law, *Cohen v. Wedbush, Noble, Cooke & Co.*, 841 F.2d 282, 286 (9th Cir. 1988), the possibility remains that such agreements could be found unconscionable under certain circumstances. Determining whether plaintiff truly lacked meaningful power to refuse the arbitration provision or to bargain over its terms, however, would require an evidentiary hearing. Because we dispose of this motion on the grounds discussed below, we find that it is unnecessary to conduct such a hearing.

VII race discrimination claim in federal court. The Court wrote:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective bargaining agreement. 415 U.S. 47-49.

So long as the plaintiff satisfied the Title VII jurisdictional requirements of presenting his claim to the EEOC and receiving a notice of right to sue, the claim could be litigated in federal court despite the arbitrator's decision. *Id.* at 45.

The Supreme Court elaborated on *Alexander* in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), when it held that an adverse arbitration decision had no preclusive effect on a Fair Labor Standards Act plaintiff's right to litigate based on the same facts submitted to arbitration. The *Barrentine* Court distinguished between contractual rights and statutory rights "designed to provide minimum substantive guarantees to individual workers," finding that the latter were so significant that courts should not defer to arbitral decisions.

While the Supreme Court did not directly hold in *Alexander* that agreements to submit to arbitration of claims arising under Title VII are not enforceable, other Circuits have applied the *Alexander* line of cases to this effect. In *Swenson v. Management Recruiters*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143 (1989), the Eighth

Circuit relied on *Alexander* to find that Title VII claims were simply not subject to arbitration, finding that "Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration agreements." 858 F.2d at 1306. Similarly, the First Circuit held in *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842 (1989), that an employee cannot prospectively waive her rights to sue under Title VII even where she signs an arbitration agreement. It should be noted that the *Utley* case is directly on point, in that it involved a female employee bringing a sex discrimination suit which the employer asserted was subject to arbitration under stock exchange rules because of the same type of U-4 form agreement at issue here.

Shearson appears to admit that *Alexander* renders Title VII claims non-arbitrable; however, it attempts to argue that *Alexander* should be limited to the collective bargaining agreement context. In doing so, Shearson focuses not on the distinction between Supreme Court precedent on arbitration of Title VII as opposed to other types of claims, but on the distinction between arbitration agreements in the group as opposed to the individual context. Shearson relies on several Supreme Court cases finding that private commercial arbitrations agreements were enforceable. None of the cases cited were in the Title VII context, however. *See, e.g., Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (Sherman Act); *Shearson American Express v. McMahon*, 482 U.S. 220 (Civil RICO treble damages claim); *Rodriguez de Quijas v. Shearson American Express*, 490 U.S. ___, 104 L.Ed.2d. 526 (1989) (Securities Exchange Act claim).

Drawing this distinction between the collective bargaining and private arbitration agreement context has been rejected in two other circuits as an incorrect interpretation of *Alexander*. The Eighth Circuit in *Swenson*, for example, found that *Alexander* "turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII." 858 F.2d at 1306. In *Utley*, the First Circuit also found that *Alexander* turned on the Title VII issue and could not be distinguished on grounds that it applied only to agreements to arbitrate contained in collective bargaining agreements.

We note that some time was devoted at oral argument to discussion of the persuasive effect of various cases regarding the arbitrability of discrimination claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.* Having reviewed the cases cited by the parties, we do not find support in this line of reasoning for Shearson's position on the arbitrability of Title VII claims. First, the authority is clearly divided concerning the arbitrability of ADEA claims. While the Fourth Circuit has held ADEA claims to be arbitrable, *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), the Third Circuit has held them to be non-arbitrable, *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3rd Cir. 1989).

Second, the court is not persuaded that even those courts finding ADEA claims arbitrable would apply the same reasoning to Title VII claims. For example, in *Gilmer*, the Fourth Circuit noted than an arbitration agreement would be unenforceable where "Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right." 895 F.2d at 197.

While the Fourth Circuit found no indication of such Congressional intention with respect to ADEA, the Supreme Court found that such intention exists with respect to Title VII claims. *Alexander,* 415 U.S. at 51-52. Thus, we do not find the Fourth Circuit's decision in *Gilmer* persuasive on the question of whether arbitration of Title VII claims should be compelled.

Finally and most significantly, Ninth Circuit authority conflicts with Shearson's position. In *Criswell v. Western Airlines,* 709 F.2d 544 (1983), the Ninth Circuit relied on the Supreme Court's decision in *Alexander* to reject deference to an arbitral decision in an ADEA case. In doing so, the court specifically drew the analogy between ADEA and Title VII claims. 709 F.2d at 548. Given that the Ninth Circuit has disfavored arbitration of ADEA claims on the rationale that the Supreme Court does not compel deference to arbitral decisions in the Title VII context, we find Shearson's argument regarding ADEA unpersuasive.

IV. CONCLUSION.

For the reasons set forth above, we find that plaintiff could not prospectively waive her right to a judicial determination of her Title VII claim. Accordingly, defendant's motion to stay proceedings and compel arbitration is hereby denied.

IT IS SO ORDERED.

DATED: June 20, 1990.

/s/ Robert F. Peckham
United States
District Judge

C-89-4473 RFP LAURYN AGNEW BIERDEMAN VS. SHEARSON LEHMAN HUTTON

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned deputy clerk, declare under penalty of perjury that I served the following document(s) as listed below by enclosing a true copy of said document(s) in a separate postage paid, sealed envelope and to-day placing the said envelope in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California, addressed as follows:

Kathleen Lucas-Wallace, Esq. (415) 433 6166
Deborah C. England, Esq.
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Peter R. Boutin, Esq. (415) 989 0616
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KEESAL, YOUNG & LOGAN
Four Embarcadero Center, Suite 1500
San Francisco, CA 94111

1) ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

DATED: June 21, 1990

/s/ Illegible
Deputy Clerk

APPENDIX 4

§ 2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting

commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or

actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivison.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or

between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not

require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679.

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§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such

school, college, university, or other educational institution or institution of lea·ning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by a quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid

to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community,

State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.